BONIFACE LOBO ROBERT V LOBO v. WONG WOOI MENG

HIGH COURT MALAYA, SHAH ALAM
MOHAMED ZAINI MAZLAN JC
[CIVIL SUIT NO: 22NCVC-174-04-2014]
2 DECEMBER 2014

CIVIL PROCEDURE: *Preliminary objection – Notice to opponent – Whether plaintiff given ample notice of defendant's preliminary objection – Whether plaintiff at disadvantage*

LEGAL PROFESSION: *Conflict of interest – Professional conduct – Whether advocate and solicitor can represent himself when firm of solicitors already appointed – Whether provisions of the Legal Profession Act 1976 and Legal Profession (Practice and Etiquette) Rules 1978 contravened – Whether notice to act in person should be filed – Rules of Court 2012, O. 64 r. 3 – Whether questions of impartiality would be raised*

The court was brought two interlocutory applications for hearing, namely the plaintiff's application for leave to enter judgment in default of defence and the defendant's application for leave to file his statement of defence out of time. At the hearing, the plaintiff was present in chambers with his counsel and the defendant's counsel. However, prior to the commencement of the hearing, the defendant's counsel gave a notice of objection to Mr Lobo from appearing as his own counsel in the proceedings on the grounds, *inter alia*, (i) that the plaintiff had a personal interest in the outcome of the suit; (ii) that he had pecuniary interest in the claim in damages; and (iii) he would put himself in an embarrassing position in contravention of the Legal Profession Act 1976 ('LPA') and the Legal Profession (Practice and Etiquette) Rules 1978 ('LP Rules'). The plaintiff resisted the preliminary objection by stating that he was appearing and conducting the case as a litigant and not as a counsel, and that the defendant's preliminary objection was in breach of the LPA and LP Rules for not giving him ample notice of the objection.

Held (allowing preliminary objection with no order as to costs):

(1) The main consideration in a preliminary objection is to ensure that no one is caught by surprise. It is also entirely at the judge's discretion whether or not to allow the preliminary objection to be carried through and the manner in which it is to be conducted. In exercising the discretion, the judge's primary consideration is to ensure that the plaintiff and his counsel would not be at a disadvantage. The judge herein had earlier adjourned the proceedings to allow both parties ample time to prepare and for the judge himself to read the submissions by both parties prior to making his decision, which had put no one at a disadvantage. (paras 19-21)

(2) The plaintiff was not prohibited from being represented by the solicitors of his choice, but he was merely barred from representing himself during proceedings by virtue of the fact that he had already appointed the firm

concerned to represent him. The writ of summons, statement of claim and other documents were filed by Messrs Surend Mokhzani & Partners as solicitors for the plaintiff. He could, of course, act for himself but he will have to first discharge Messrs Surend Mokhzani & Partners and file a notice to act in person under Form 137 as stipulated under O. 64 r. 3 of the Rules of Court 2012. (paras 34, 36 & 37)

(3) In the event that the plaintiff chose to act for himself, he is prohibited under r. 30 of the LP Rules from wearing a robe, to ensure that he was treated like a layperson and not as an advocate and solicitor. To allow the plaintiff to take part in the proceedings would contravene r. 27 of the LP Rules, in that the plaintiff is pecuniarily interested in the suit and would raise the question on his impartiality. If the plaintiff was allowed to conduct the proceedings, as well as be represented by an advocate from his solicitors' firm, it would not be the defendant's fault to think he was at a disadvantage. (paras 38-40 & 43)

(4) It is vital to ensure that the public's trust in the courts be steadfastly guarded. No litigant should be made to feel at a disadvantage in court. (para 44)

Case(s) referred to:

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 1 LNS 67 HC ***(refd)***

Low Long Yoong & Anor v. Low Kok Choon & Anor [2014] 4 CLJ 577 HC ***(refd)***

Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316 CA ***(refd)***

Sinwara Sdn Bhd v. Maris Housing Sdn Bhd & Anor [2002] 1 LNS 480 HC ***(refd)***

Srimurugan Alagan v. Sol [Rtd] Zakaria Salleh (Kuala Lumpur High Court Suit No. S7-23-98-2007) (Unreported) ***(refd)***

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 8(2)

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5, 27(a), 28(a), 30(a)

Rules of Court 2012, O, 5 r. 6, O. 64 r. 3

For the plaintiff - Subithra Dali; M/s Surend Mokhzani & Partners
For the defendant - Annou Xavier; M/s Azri, Lee Swee Seng & Co

Reported by Lyana Shohaimay

JUDGMENT

Mohamed Zaini Mazlan JC:

Introduction

[1] There were two interlocutory applications that initially came up for hearing before me, namely the plaintiff's applications for leave to enter judgment in default of defence, and the defendant's application for leave to file his statement of defence and counterclaim out of time.

[2] The plaintiff, whom I shall refer to as Mr Lobo, was present in chambers together with his counsel, and so too was the defendant's counsel.

[3] However, prior to the hearing commencing, the defendant's counsel gave notice of his objection to Mr Lobo appearing as counsel in the proceedings. He then tendered his written submissions, and a bundle of authorities in respect of his objection.

[4] I then enquired from Mr Lobo and his able counsel Ms Subithra Dali, whether they have been given a copy of the submissions prior to the hearing, to which they answered in the negative.

[5] I am mindful of the need for fairness, and decided to adjourn the hearing, to enable the plaintiff's counsel time to consider the defendant's counsel's objection. I also directed counsels for both parties to exchange their written submissions and reply, and gave a date for decision.

[6] Having read and considered the submissions and authorities submitted by both parties, I allowed the defendant's preliminary objection, but made no order as to costs.

[7] The effect is that Mr Lobo was barred from appearing as counsel in this suit.

The Suit In Brief

[8] The plaintiff is an advocate and solicitor of the High Court of Malaya. He was also a chairman of the joint management body ("JMB") of Silverpark Resort in Fraser's Hill.

[9] The JMB consisted of the housing developer and 348 owners of apartment in Fraser's Hill.

[10] The plaintiff and defendant were also elected members of the executive committee of the joint management committee.

[11] Both the plaintiff's and defendant's claim against each other is for defamation. The plaintiff's statement of claim ran into 122 paragraphs. The defendant's proposed defence and counterclaim on the other hand, ran into 315 paragraphs. It is however only a proposed defence and counterclaim, as the defendant's application for leave to file them has not been disposed of yet.

[12] It would suffice for me to just state that the dispute between them is acrimonious.

The Preliminary Objection

[13] Counsel for the defendant took issue with Mr Lobo appearing as counsel in this suit, based on the following grounds:

(a) He has a personal interest in the outcome of this suit,

(b) He has a pecuniary interest in the claim for damages,

(c) He is the main witness for the trial,

(d) His claim is based on the purported seven libellous emails directed to himself, and

(e) He would put himself in an embarrassing position in contravention of the Legal Profession Act 1976 ("LPA") and the Legal Profession (Practice and Etiquette) Rules 1978 ("LP Rules").

[14] Mr Lobo took umbrage with the objection. He had in particular taken offence with the suggestion, that he, who has been in practice for 34 years, had committed an act of misconduct. In fairness to the defendant's counsel, I do not think that he had any intention to doubt Mr Lobo's integrity as an advocate and solicitor. Certainly, in the proceedings before me, Mr Lobo had acted courteously, and conducted himself with decorum.

[15] Mr Lobo in resisting the preliminary objection, stated the following:

(a) That the defendant's preliminary objection was in breach of the LPA and LP Rules,

(b) That he had appeared and conducted the case as a litigant, and not as counsel, and

(c) The objection runs foul of art. 8(2) of the Federal Constitution.

[16] I had firstly addressed Mr Lobo's contention that the preliminary objection was in breach of the LPA, as the preliminary objection would have been a non-starter had I agreed with Mr Lobo.

Whether Ample Notice Of The Preliminary Objection Was Given

[17] In resisting the defendant's preliminary objection, Mr Lobo firstly took issue with the manner in which the objection was done. He asserted that the defendant did not give sufficient notice, and the manner in which the objection was raised had run foul of r. 11.04 of the Rules and Rulings of the Bar Council of Malaysia. This rule, which comes under Chapter 11: Court Practice, states as follows:

> 11.04 Notice of preliminary objection
>
> (1) An Advocate and Solicitor shall give written notice to the Advocates and Solicitors representing all the other parties in the litigation, of his/her intention to raise a preliminary objection at any hearing before any court, tribunal or other body.
>
> (2) Such written notice shall be given to the other Advocates and Solicitors within a reasonable time before the hearing and in any event not later than 4 clear working days before the hearing, to enable the other Advocates and Solicitors to properly prepare themselves and to secure instructions from their clients with regard to the proposed preliminary objection.

(3) Such written notice shall set out the following details:

(a) the nature of the proposed preliminary objection;

(b) a list of authorities that the Advocate and Solicitor raising the preliminary objection intends to rely on; and

(c) the proposed relief that the Advocate and Solicitor raising the preliminary objection will seek before the court, tribunal or other body.

(4) Only in exceptional circumstances may an Advocate and Solicitor raise a preliminary objection during the hearing of any matter without giving the written notice required in this Ruling. In such event the Advocates and Solicitors representing the other parties are entitled to request for an adjournment of the preliminary objection and the Advocate and Solicitor raising the preliminary objection is precluded from objecting to such a request.

(5) Nothing in this Ruling shall affect the general discretion of the relevant court, tribunal or other body to deal with preliminary objections, including making orders for costs.

[18] The defendant's counsel asserted, that he had indicated an intention to raise an objection on this issue, when parties had appeared before the learned Senior Assistant registrar for case management.

[19] I had read thoroughly the authorities pertaining to preliminary objections, and conclude that the main consideration is to ensure that no one is caught by surprise. That I believe was also the intention for the Bar Council's ruling on preliminary objections. The authorities also conclude, that it is entirely my discretion, whether to allow a preliminary objection to be carried through, and the manner in which it is to be conducted.

[20] In exercising my discretion to allow the defendant to proceed with their preliminary objection, my primary consideration was to ensure that the Mr Lobo and his counsel, would not be at a disadvantage.

[21] As I have stated earlier, I had adjourned proceedings to allow both parties ample time to prepare. I have also had sufficient time in reading the submissions by both parties, prior to making my decision. I am certain that no one was put at a disadvantage.

The Defendant Grounds For Disqualification

[22] The defendant relied on rr. 27(a) and 28(a) of the LP Rules, which states as follows:

27. Advocate and solicitor not to appear where pecuniarily interested

(a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

28. Advocate and solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

[23] The defendant cited numerous authorities in support, which I shall set out in summary:

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754, [1997] 5 MLJ 705 (HC)

Abdul Malik Ishak J (as he then was), referred extensively to decided cases within our jurisdiction and other jurisdictions, and came to the conclusion that the right of an individual to be represented by an advocate and solicitor of his choice is not absolute, and that is the court that has the ultimate right to make that determination. His Lordship barred the plaintiff's counsel Mr Muthusamy, and his firm, from representing the plaintiff, as the former was personally involved, and could be called as a witness.

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 1 LNS 67, [1996] 4 MLJ 54 (HC)

In this case, the affidavit in support of the originating summons was affirmed by the applicant's counsel. By way of *obiter*, Kang Hwee Gee J referred to r. 28 of the LP Rules, and stated that it is against ethics for a counsel to affirm an affidavit containing substantive allegations for his client, and later pleads the client's case in court. His Lordship also remarked that the counsel should have left the conduct of the case to another counsel.

Sinwara Sdn Bhd v. Maris Housing Sdn Bhd & Anor [2002] 1 LNS 480, [2003] 6 MLJ 771 (HC)

Abdul Wahab J allowed the defendant's counsel's preliminary objection on the plaintiff's counsel appearing for the case, as the latter was apparently an owner of one of the lots for the development in this case. His Lordship emphasised on the need for counsel to be objective, and that this could not be achieved, if the counsel has a pecuniary interest in the suit. His Lordship further stated that '... failure to act in an objective manner contributes significantly to confusing the issues, making litigation more lengthy and expensive and resulting in a decision that is less right, fair and just than it could have been'. [774]

Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316; [2009] 4 MLJ 293 (CA)

> In this case, the firm of Messrs Lee Hishammuddin Allen & Gledhill was disqualified by the High Court from representing the appellant, on the basis that two of their partners were involved in the incident that occurred prior to the suit being commenced. The Court of Appeal upheld the High Court's decision. Suriyadi JCA (now FCJ), in delivering the Court of Appeal's decision, stated that although r. 28(a) does not state expressly that any disqualification of an advocate and solicitor is founded on the premise of wanting to avoid any ethical consternation, His Lordship was of the view that that was the underlying purpose of this rule [304].

The Rebuttal

[24] Mr Lobo had in his submissions, and I pause here to note that he had signed the submissions in his own name, but filed it through his solicitors, namely Messrs Surend Mokhzani & Partners, clarified that he is acting for himself, and not in the capacity of an advocate and solicitor.

[25] This assertion however, was disputed by the defendant's counsel. He claimed that it was made known during case management before the learned Senior Assistant Registrar, that Mr Lobo would appear as counsel, and that he had then made it known that he intends to raise an objection.

[26] In referring to the authorities cited by the defendant's counsel and the LP Rules, Mr Lobo highlighted that they pertain to counsel who had acted for their client, and that they were not in respect of one who had represented himself. He went on to postulate, that if the LP Rules were meant to include a litigant in person, then a counsel would not be able to act for his client, as the fees charged would be a pecuniary interest.

[27] Mr Lobo cited an unreported decision by T Selventhiranathan J (as he then was),in the case of Kuala Lumpur High Court Suit No. S7-23-98-2007; *Srimurugan Alagan v. Sol [Rtd] Zakaria Salleh*. Although the facts of the case were not cited, the relevant paragraph in His Lordship's 'contemporaneous oral grounds of judgment' stated as follows:

> On enclosure (37) proper, I am of the view that rules 27 and 28 of the Legal Profession [Practice and Etiquette] Rules 1978 are only applicable to an advocate and solicitor who acts for a party as such, and do not prevent an advocate and solicitor from acting in person, if he elects to do so. These rules have to be so construed as otherwise an advocate and solicitor who sues or is sued in this personal capacity will be at a disadvantage *vis-à-vis* the ordinary individual who can sue on his own or defend himself on his own.

[28] Mr Lobo also relied on O. 5 r. 6, and O. 64 r. 3 of the Rules of Court 2012, and also r. 30(a) of the LP Rules to assert his rights to commence and carry on proceedings in person.

[29] Finally, Mr Lobo submitted that distinguishing an advocate and solicitor and a lay person, will run foul of the anti-discrimination provision of art. 8(2) of the Federal Constitution. I have difficulty in appreciating this particular submission, and shall not address it.

The Grounds For Disqualification

[30] This is indeed a novel situation. This is a case of whether Mr Lobo, an advocate and solicitor, should be allowed take part in the court's proceedings as counsel, or as he claims, to represent himself, when he has already appointed a firm of solicitors.

[31] All the cases that have been cited, concerns advocates and solicitors that were disqualified from acting for their clients.

[32] The only case on similar facts that I had come across was that of *Low Long Yoong & Anor v. Low Kok Choon & Anor* [2014] 4 CLJ 577; [2014] 2 MLJ 725 (HC). In that case S Nantha Balan JC made known his concern that the first plaintiff, Mr Sunny Khoo, is also an advocate and solicitor, and that his firm was also on record as the solicitors for the plaintiffs. The learned Judicial Commissioner remarked that Mr Sunny Khoo did not appear as the plaintiff in person, and was appearing as counsel, and made known his concern that this could run foul of rr. 3, 4, 5, 27 and 28 of the LP Rules.

[33] The learned Judicial Commissioner was of the view that Mr Sunny Khoo should not appear as counsel, as he has a pecuniary interest in the matter, and would be a material witness should the matter proceed for trial. Unfortunately, since the defendants did not take any issue with Mr Sunny Khoo appearing as counsel, the issue was not ventilated further.

[34] Here, Mr Lobo was not prohibited from being represented by the solicitors of his choice, namely Messrs Surend Mokhzani & Partners. I had merely barred him from representing himself during proceedings. This is by virtue of the fact that he has already appointed the firm concerned to represent him.

[35] Order 5 r. 6 of the Rules of Court 2012 clearly states that any person may begin, and carry on proceedings, either by a solicitor or in person. Mr Lobo needs to make a choice. Either he chooses to represent himself, or appoint a firm of solicitors to do so.

[36] In this suit, the writ of summons and statement of claim, the numerous applications and affidavits were filed by Messrs Surend Mokhzani & Partners as solicitors for Mr Lobo.

[37] Mr Lobo could of course choose to act for himself, but he would firstly need to discharge Messrs Surend Mokhzani & Partners, and then file a notice to act in person in Form 137, as stipulated under O. 64 r. 3 of the Rules of Court 2012.

[38] In the event that Mr Lobo chose to act for himself, r. 30 of the LP Rules prohibits him from wearing a robe. The purpose for this rule, is to ensure that an advocate that acts in person, is treated as a lay person, and not as an advocate or solicitor.

[39] I am also of the view that to allow Mr Lobo to take part in proceedings would contravene r. 27 of the LP Rules. In this suit, Mr Lobo is amongst others, seeking for damages amounting to RM6,500,000. Clearly he is pecuniarily interested.

[40] In my considered opinion, the prohibition under r. 27 is to ensure that advocates and solicitors remain objective when conducting their case. Their impartiality could be called into question, if they have a pecuniary interest in the subject matter.

[41] An advocate and solicitor is accorded special status, for he is treated first and foremost as an officer of the court, and with that status, it carries great responsibility, more so in an adversarial system such as ours, where the courts rely on advocates to conduct proceedings fairly and honourably.

[42] I am also mindful of the need for proceedings to be conducted in an orderly manner. It should not only be conducted fairly, but be seen to be conducted fairly.

[43] If Mr Lobo is to be allowed to conduct proceedings in person, and at the same time be represented by an advocate from his solicitors' firm, the defendant would not be faulted to think that he would be put at a disadvantage, more so when Mr Lobo is also an advocate and solicitor.

[44] It is vital to ensure that public's trust in our courts be steadfastly guarded. No litigant should be made to feel at a disadvantage in our courts.

[45] As stated in the case of *Sykt Pengangkutan Sakti (ibid)*, the right of a litigant to appoint an advocate and solicitor of his choice is not absolute, as the courts have the ultimate right to make that determination.

[46] I had for these reasons, allowed the defendant's preliminary objection, but made no order as to costs.